No. 21-901

IN THE

Supreme Court of the United States

CASONDRA POLLREIS, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, W.Y. AND S.Y.,

Petitioner,

v.

LAMONT MARZOLF,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE DKT LIBERTY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Counsel for the DKT Liberty Project timely notified the parties of its intention to submit an amicus brief in this case, as required by Supreme Court Rule 37.2(a). Counsel for petitioner consented to the filing of the brief, but counsel for respondent withheld consent. Accordingly, the Liberty Project respectfully moves this Court for leave to file the attached amicus brief in support of petitioner pursuant to Supreme Court Rule 37.2(b).

The Liberty Project is dedicated to the protection of constitutional rights and individual liberties. It strongly believes that the Fourth Amendment's prohibition against unreasonable searches and seizures is indispensable to American freedom, and that the rigorous enforcement of this prohibition is necessary to preserve our system of limited government and individual freedom.

This case presents the Court with an opportunity to correct course on lower courts' erosion of the protections of the Fourth Amendment and unwarranted expansion of police power. This Court has repeatedly emphasized that the terms of the Fourth Amendment should be understood in light of the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *see also, e.g.*, *Torres v. Madrid*, 141 S. Ct. 989, 995–96 (2021); *California v. Hodari D.*, 499 U.S. 621, 624 (1991). The Liberty Project's brief will aid the Court in considering the petition for a writ of certiorari by explaining why respondent's actions would constitute arrests under the common law and

therefore require probable cause under the Fourth Amendment.

For these reasons, the Court should grant the motion to file the attached brief of the DKT Liberty Project as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Does the Fourth Amendment permit the search and seizure without probable cause of two compliant children, handcuffed and at gunpoint, even after the children have identified themselves to the seizing officer and been independently identified by their parents?

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INTEREST OF *AMICUS CURIAE*[1]

The DKT Liberty Project, a not-for-profit organization, was founded in 1997 to promote individual liberty against encroachment by all levels of government, and especially encroachment on the civil liberties of private individuals. The Liberty Project has participated as *amicus* in this Court numerous times, including in other cases involving intrusions on Fourth Amendment rights. *See, e.g.*, *Lange v. California*, 141 S. Ct. 2011 (2021); *Riley v. California*, 573 U.S. 373 (2014); *Kyllo v. United States*, 533 U.S. 27 (2000). Because of its long track record of protecting citizens from government overreach, the Liberty Project is well situated to explain why and how the Court should apply the common law to determine that Fourth Amendment "seizures" occurred here and reject the Eighth Circuit's unwarranted expansion of police power.

SUMMARY OF ARGUMENT

This case implicates the fundamental right to be free from unreasonable seizures. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

This Court has emphasized that the terms of the Fourth Amendment should be understood in light of the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *see also, e.g.*, *Torres v. Madrid*, 141 S. Ct. 989, 995–96 (2021); *California v. Hodari D.*, 499 U.S. 621, 624 (1991). The Eighth Circuit's decision failed to engage in that inquiry and is in direct conflict with centuries of common law. No court applying the common law in 1791 or 1868 would comprehend the Eighth Circuit's holding in this case that a police officer who detained and handcuffed two compliant children at gunpoint had not "arrested" them.

The "vast legal library" of the common law "must be used thoughtfully" in a manner that "respect[s] legal history." *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissenting). Here, a thorough review of the common law confirms that arrests of the children occurred in this case under both forms of "arrest" that English and American courts recognized decades before and after the ratifications of the Fourth Amendment in 1791 and the Fourteenth Amendment in 1868. *First*, arrests occurred when the police officer handcuffed the two children because he intended to restrain them and succeeded in doing so. *See Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605); *accord Butler v. Washburn*, 25 N.H. 251, 258 (1852) ("any touching, however slight, is enough"). *Second*, arrests occurred when the officer issued orders to, and trained his gun at, the two children because they submitted to his "show of authority." *See Horner v. Battyn*, B.N.P. 62 (1738) (reprinted in William Lloyd, Cases on Civil Procedure 798 (1916)).

The decision below is wrong and would be unrecognizable to any common law court in 1791 or 1868. The Court should grant the petition for a writ of certiorari and reverse the Eighth Circuit's decision.

ARGUMENT

The Eighth Circuit's holding is in direct conflict with the common law of arrest and the Founding- and Reconstruction-era understandings of a "seizure." This Court's precedents establish that, in keeping with the text and purpose of the Fourth Amendment, the common law of arrest informs whether a person has been "seized." At common law, an arrest occurred where an officer used "either physical force" or obtained "submission to the assertion of authority" to detain an individual. *Torres*, 141 S. Ct. at 995 (quoting *Hodari D.*, 499 U.S. at 626) (quotation marks and emphasis omitted). The police officer here accomplished arrests through both means.

I. The Common Law Of Arrest Should Inform The Meaning Of "Seizure" Under The Fourth Amendment.

The Eighth Circuit followed its version of an amorphous balancing test to determine whether the officer's stop and search of the two children constituted arrests. *See* Pet. 16–20 (describing circuit split over the application and expansion of *Terry v. Ohio*, 392 U.S. 1 (1968)). In this case, the balancing inquiry led to the bizarre and mistaken decision that the officer did not arrest two compliant children when he handcuffed them and held them on the ground at gunpoint.

The Eighth Circuit's decision countenances police misconduct that "the fiercely proud men who adopted

our Fourth Amendment would [not] have allowed themselves"—or their children—"to be subjected" to. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring). By contrast, grounding the determination of what constitutes a "seizure" in the common law of arrest is faithful to the text and purpose of the Fourth Amendment, as this Court has recognized time and again. The Court should grant the petition to reaffirm the common law's relevance to the Fourth Amendment and prevent the further unwarranted expansion of the "narrow" and "limited" exception in *Terry*. *Michigan v. Summers*, 452 U.S. 692, 698 (1981); Pet. 13.

A. The Court's Fourth Amendment Precedents Apply The Common Law Of Arrest.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As this Court has "repeatedly recognized, 'the arrest of a person is quintessentially a seizure'" for purposes of the Fourth Amendment. *Torres*, 141 S. Ct. at 996 (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)); *see also Hodari D.*, 499 U.S. at 624; *Dickerson*, 508 U.S. at 380–81 (Scalia, J., concurring). Because "[t]he 'seizure' of a 'person' plainly refers to an arrest," this Court "properly look[s] to the common law of arrest for 'historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted.'" *Torres*, 141 S. Ct. at 996 (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018)) (quotation marks from *Carpenter*

omitted).[2]

In *Hodari D.*, for example, the Court held that a person who failed to comply with a police officer's show of authority was not "seiz[ed]" within the meaning of the Fourth Amendment. Central to that decision was the common law of arrest—under the common law, an arrest required "*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." 499 U.S. at 626.

In *Torres*, this Court reaffirmed that approach by noting the key "linkage" between a "seizure" of a "person" and an "arrest" at the Founding. 141 S. Ct. at 996 (citing 1 Samuel Johnson, A Dictionary of the English Language 108 (4th ed. 1773)). Notably, although the Court split 5–3, both the majority and dissent agreed that the common law of arrest was central to the Fourth Amendment inquiry. *See id.* at 1003 (majority op.); *id.* at 1008–14 (Gorsuch, J., dissenting).

The Court also regularly examines the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing" in evaluating the scope of the Fourth Amendment as a whole. *Wilson*, 514 U.S. at

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[2] In *Terry*, the Court arguably departed from the common-law understanding of an "arrest" in the context of a police officer's pat-down of suspects the officer reasonably suspected were armed and dangerous. 392 U.S. at 7–8. As Petitioner explains, Pet. 14–17, this Court has made clear that *Terry* is a narrow exception to the ordinary rule that any common-law arrest requires probable cause, and has never extended *Terry*'s amorphous test to seizures as violent and intrusive as occurred here.

931; *cf. Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.").

B. The Text And Purpose Of The Fourth Amendment Point Toward The Common Law Of Arrest.

1. During the Founding era, an "arrest" was a "seizure" of a person. Just six years before the Fourth Amendment was ratified, Samuel Johnson defined "arrest" to mean "any . . . seizure of the person." 1 Samuel Johnson, A Dictionary of the English Language (6th ed. 1785); *see also id.* (defining the verb "arrest" as "[t]o seize; to lay hands on; to detain by power"); 1 John Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) (defining the verb "arrest" as "[t]o seize a man for debt, to apprehend by virtue of a writ from any court of justice, to stop, to hinder").

This understanding of "arrests" and "seizures" persisted after the Founding. For example, in the early nineteenth century, Noah Webster defined "arrest" to mean "[a]ny seizure, or taking by power." 1 Noah Webster, An American Dictionary of the English Language (1828); *see also id.* (defining the verb "arrest" as "[t]o take, seize or apprehend by virtue of a warrant from authority"). Webster noted that in using the word "seize," "[w]e say, to *arrest* a person, to seize goods." 2 Webster, Dictionary of the English Language (emphasis added).

Those who ratified the Fourth and Fourteenth

Amendments would have therefore understood that "seizures" included common law "arrests." "Joseph Story, among others, saw the Fourth Amendment as 'little more than the affirmance of a great constitutional doctrine of the common law[.]'" *Moore*, 553 U.S. at 169 (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1895, at 748 (1833)); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) ("an examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable" (alteration and quotation marks omitted)).[3]

2. The core purpose of the Fourth Amendment is to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter*, 138 S. Ct. at 2213 (quotation marks omitted). By looking to the common law of arrest, this Court ensures that the Fourth Amendment's protections stand firm over time. *See Dickerson*, 508 U.S. at 380 (Scalia, J., concurring) ("The purpose of the [Fourth Amendment] . . . is to

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[3] To be sure, the Amendment expanded the scope of protections English law afforded in important ways. *See, e.g.*, *Riley*, 573 U.S. at 403 (discussing "the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity"); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 723 (1999) (explaining that the Fourth Amendment was adopted to address "a specific vulnerability in the protections afforded by common-law arrest and search authority").

preserve th[e] degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"). Lower courts' growing departure from the common law, exemplified below by the Eighth Circuit, deviates from the original understanding that the right to be free from unreasonable seizures would be vindicated by private parties in suits for false arrest.

To avoid potentially significant personal liability at common law, a person charged with making a warrantless arrest was required to show that it was based on "suspicion." *See* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 Texas Tech L. Rev. 299, 333 (2010). Contemporary treatises spoke of "suspicion" as a requirement similar to today's probable cause standard:

> [W]hoever would justify the arrest of an innocent person by reason of any such suspicion, must not only shew that he suspected the party himself, but must also set forth the cause which induced him to have such a suspicion, that it may appear to the court to have been a sufficient ground for his proceeding.

2 William Hawkins, A Treatise of the Pleas of the Crown 120 (1824); *see also* 2 Matthew Hale, A History of Pleas of the Crown 88 (W.A. Stokes & E. Ingersoll eds., 1st Am. ed. 1847) (1824) (contemporary editor's notes) ("[S]uspicion must not be a mere causeless suspicion, but must be founded on some probable

reason.").

In general, an arrest for a misdemeanor was "justifiable only if the offense occurred in the presence of the person making the arrest and the arrestee was in fact guilty, meaning that the acquittal of the arrestee exposed the individual making the arrest to liability for trespass." Rosenthal, 43 Texas Tech L. Rev. at 333 (citation omitted). Even a felony arrest was justified only "if a felony had in fact been committed and there was 'probable cause of suspicion' to believe that the arrestee had committed the offense." *Id.* (citation omitted); *see also* 4 William Blackstone, Commentaries on the Laws of England 289 (1769) (noting that an officer "may, without warrant, arrest any one for a breach of the peace . . . [a]nd, in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may upon probable suspicion arrest the felon").

Suits for civil damages alleging unlawful seizures were familiar to Americans at the time of the Founding and through Reconstruction. *See, e.g.*, *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Burlingham v. Wylee*, 2 Root 152 (Conn. Super. Ct. 1794); *Smith v. McGuire*, 15 Ky. (5 Litt.) 302 (1824); *Barrett v. Copeland*, 18 Vt. 67 (1844). "The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass," and, like the English common law suits alleging unlawful arrest, the legality of the officer's conduct and the legitimacy of the arrest provided a defense. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 399 (1987).

In short, the generations that ratified the Fourth and Fourteenth Amendments would have expected that civil damages would be available against law enforcement officers who, as here, make an unjustified arrest without probable cause. The circuit courts' escalating departure from the common law frustrates those expectations and dilutes the Fourth Amendment's protections.

II. Under The Common Law, Officer Marzolf Arrested The Children When He Forced Them To Lay On The Ground, In Handcuffs, At Gunpoint.

Common law jurists would have been perplexed by the Eighth Circuit's holding that Officer Marzolf did not arrest two compliant children when he ordered them to the ground at gunpoint and handcuffed them. As this Court has consistently recognized, an arrest occurred at common law whenever an officer used "either physical force" or "submission to the assertion of authority" to detain an individual. *Torres*, 141 S. Ct. at 995 (quoting *Hodari D.*, 499 U.S. at 626) (quotation marks and emphasis omitted). Here, Officer Marzolf arrested the boys through both means.[4]

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[4] The Court need not decide whether Officer Marzolf's initial stop of the two children could be justified under the narrow exception in *Terry*, since his subsequent conduct plainly went far beyond the minimal intrusions the Court allowed in that case.

A. Applying Physical Force To Detain An Individual Constituted An Arrest At Common Law.

1. At common law, the "quintessential 'seizure of the person' . . . [was] the mere grasping or application of physical force with lawful authority . . . ." *Hodari D.*, 499 U.S. at 624 (quoting 2 Webster, Dictionary of the English Language). "All the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit." *Nicholl v. Darley*, 2 Y. & J. 399, 400, 148 Eng. Rep. 974 (Exch. 1828) (citing *Hodges*, Cro. Jac. at 485, 79 Eng. Rep. at 414; *see also Torres*, 141 S. Ct. at 996 (relying on *Nicholl* and *Hodges*). At least where, as here, an officer intends to detain a suspect, physically touches the suspect, and the application of force is accompanied by the suspect's apprehension, there is no serious question whether the officer arrested the suspect within the common law meaning. *Compare Torres*, 141 S. Ct. at 1012 n.4 (Gorsuch, J., dissenting) ("Blackstone equated a criminal arrest with 'apprehending or restraining one's person . . . .'" (quoting 4 Blackstone, Commentaries 1008 (alteration adopted))), *with id.* at 998 (majority op.) (arrest occurs where "force [is] used to apprehend," regardless of whether the suspect is apprehended).

Common law courts have applied this rule for centuries.[5] More than four hundred years ago—and

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[5] Concurring in *Minnesota v. Dickerson*, Justice Scalia opined that "the so-called night-walker statutes" existing at common law "suggested" that "the 'stop' portion of the *Terry* 'stop-and-frisk' holding accords with the common law." 508 U.S. at 380

decades before the Glorious Revolution and its "attendant English Bill of Rights," *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019)—the Star Chamber considered whether a noble woman was immune from arrest to execute a writ for a judgment of debt. *Rutland's Case*, 77 Eng. Rep. 332. The Countess was indeed immune, meaning the serjeants-at-mace had committed an unauthorized arrest because they "shewed her their mace, and touching her body with it, said to her, 'we arrest you, madam . . . ." *Id.* at 336.

The King's Bench in 1615 likewise found that a bailiff's placing his hand on an arrestee and announcing, "[h]ere I do arrest you by virtue of a warrant that I have," was an arrest. *Hodges v. Marks*, Cro. Jac. 485, 79 Eng. Rep. 414 (K.B. 1615). And in 1678, the King's Bench found an arrest when a "bailiff caught one by the hand (whom he had a warrant to arrest) as he held it out of a window," demonstrating that the touch alone accomplished the seizure. *Anonymous*, 1 Vent. 306, 86 Eng. Rep. 197 (K.B. 1678).

(Scalia, J., concurring). The Nightwalker Statutes did permit lay "[w]atchmen . . . [to] *virtue officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning." 4 Blackstone, Commentaries 289. But these statutes merely specified who could lawfully make arrests, and for what conduct. They provide no evidence that a watchman's physical detention of a suspicious person would not be considered an arrest under the common law. *See* 2 Hale, A History of the Pleas of the Crowns 88 (stating that "the constable may *arrest* suspicious nightwalkers" (emphasis added)); 4 Blackstone, Commentaries 289 (permitting a watchman to "commit [the offender] to custody till the morning"); *see also United States v. Johnson*, 921 F.3d 991, 1009–10 (11th Cir. 2019) (en banc) (Jordan, J., dissenting) (collecting academic authorities).

This rule persisted beyond the Glorious Revolution and reached the English pre-colonial period unbroken. *See, e.g.*, *Anonymous*, 87 Eng. Rep. 1060 (Q.B. 1702) ("If a window be open, and a bailiff put his hand and touch one for whom he has a warrant, he is thereby his prisoner, and may break open the door to come at him."). For example, in *Genner v. Sparks*, the Queen's Bench found no arrest where a bailiff announced an arrest "but did not lay his hands" on the suspect, having been warded off by the suspect wielding a pitchfork as he retreated into his home. 6 Mod. 173, 87 Eng. Rep. 928, 928–29 (Q.B. 1704). The court observed, however, that an arrest would have occurred if the bailiff "had but touched the defendant even with the end of his finger." *Id.*; *accord Butler*, 25 N.H. at 258 ("any touching, however slight, is enough").

The common law rule then crossed the Atlantic, where American courts applied it at the Founding and through the adoption of the Fourteenth Amendment in similar fashion. *Hodari D.*, 499 U.S. at 624 (citing *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862)); *see also Hart v. Flynn's Ex'r*, 8 Dana 190, 191 (Ky. Ct. App. 1839) ("Arrest signifies a restraint of the person, a restriction of the right of locomotion[.]"); *Montgomery Cnty. v. Robinson*, 85 Ill. 174, 176 (1877) (Arrest is the "apprehension or detaining of the person in order to be forthcoming to answer to an alleged or supposed crime.").

2. Under the common law, therefore, courts would have agreed that Officer Marzolf's handcuffing the boys constituted arrests, and thus "seizures," because he touched them with the intent to apprehend them. *See United States v. Benner*, 24 F. Cas. 1084, 1086–87

(C.C.E.D. Pa. 1830) ("An arrest is the taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest."). Of course, Officer Marzolf did not merely touch the children—he did much more. That he went beyond touching and used handcuffs to detain them confirms that arrests occurred under any reasonable interpretation of the common law. *See Torres*, 141 S. Ct. at 1008 (Gorsuch, J., dissenting) (concluding that "an 'arrest' at common law ordinarily required possession").

Given the breadth of the rule, which applies to far less intrusive touching, it is of no consequence that common law cases generally did not specifically rely on the application of handcuffs. Courts should not decline to "carve out [a] greater intrusion on personal security" than the Framers foresaw "just because founding-era courts did not confront apprehension" by modern means. *Torres*, 141 S. Ct. at 998 (majority op.). Here, placing the children in handcuffs—as they lay face down on the ground—imposed an even *greater* restraint on their liberty than simply grasping them, and under any reading of the common law courts in 1791 and 1868 would have recognized that the officer arrested them. *See id.* at 996–97; *id.* at 1008–10 (Gorsuch, J., dissenting) (arguing that an arrest required a restraint on the suspect's liberty in addition to a physical touching).

Moreover, "the focus of the Fourth Amendment is 'the privacy and security of individuals,' not the particular manner of 'arbitrary invasion by governmental officials.'" *Torres*, 141 S. Ct. at 998 (majority op.) (quoting *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967))

(alteration adopted). The Court "must take the long view, from the original meaning of the Fourth Amendment forward." *Kyllo*, 533 U.S. at 40. Under that view, an arrest undoubtedly occurred here.

B. Even Without Physical Force, Obtaining Submission Through A Show Of Authority Independently Constituted An Arrest At Common Law.

Centuries of common law show that Officer Marzolf also arrested W.Y. and S.Y. when he pointed his gun at them and forced them to lay on the ground.

1. By the time of the Founding, common law courts had established that an arrest occurs where an officer obtains submission to a show of authority even where physical touch is absent. The watershed case came in 1738, in *Horner v. Battyn*, where "it was objected that there had not been a legal arrest, as the bailiff had never touched the defendant." *Nicholl*, 148 Eng. Rep. at 974 (summarizing *Horner*, B.N.P. 62 (reprinted in William Lloyd, Cases on Civil Procedure 798 (1916))). The court nevertheless held that "this is a good arrest; and if the bailiff who has a process against one, says to him when he is on horse-back, or in a coach, 'you are my prisoner, I have a writ against you,' upon which he submits, turns back, and goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to process . . . ." *Id.* at 974–75.

Since *Horner*, Anglo-American courts have recognized this second form of arrest—where an officer obtains submission to his show of authority even without a physical touching. *See, e.g.*, *Pike v. Hanson*, 9 N.H. 491, 493 (1838) (citing *Horner*);

Hollister v. Goodale, 8 Conn. 332, 335 (1831) (same); *see also* 1 William Dickinson, A Practical Exposition of the Law Relative to the Office and Duties of a Justice of the Peace 117 (London: Reed & Hunter 1813) ("If an officer say to the party, 'I arrest you in the *king's name*;' the party at his peril ought to obey him; and if he have no lawful authority, the party grieved may have his action of false imprisonment."); *Sherriff of Hampshire v. Godfrey*, 87 Eng. Rep. 1247, 1247 (K.B. 1738) ("[I]f he knows there is a process against him, and submit to it, it is an arrest[.]"); 1 Richard Burn, The Justice of the Peace 275 (28th ed. 1837) ("In making the arrest, the constable or party making it should actually seize or touch the offender's body, *or otherwise restrain his liberty*." (emphasis added)).

2. Accordingly, courts applying the common law would have agreed that arrests occurred when Officer Marzolf issued a command to stop, and the children complied. *Horner*, B.N.P. 62. Based on only the dispatcher's description that one suspect was taller than the other, Officer Marzolf instructed the boys to stop, drew his weapon, ordered them to lie on the ground, and stood over them with his weapon trained on their backs even after their parents arrived on the scene to identify them. Pet. 5–9.

The boys' immediate compliance with Officer Marzolf's orders, faced with potentially deadly force, was a quintessential "submission to the assertion of authority." *Hodari D.*, 499 U.S. at 626 (emphasis omitted). Founding- and Reconstruction-era courts applying the common law would have thus found that Officer Marzolf arrested the boys even before he applied handcuffs and physically detained them.

* * *

In sum, the decision below would be unrecognizable to those who ratified the Fourth and Fourteenth Amendments. No common law court in 1791 or 1868 would have concluded that an officer did not "arrest" two compliant children when he handcuffed them and held them on the ground at gunpoint. The Eighth Circuit's contrary decision risks the "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals" that the Fourth Amendment was crafted to prevent. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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